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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 582.

THE COUNTY OF DIXON IN THE STATE OF NEBRASKA, PLAINTIFF IN ERROR,

vs.

MARSHALL FIELD.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

FILED AUGUST 7, 1882.

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1, 2 Pleas before the Honorable Elmer S. Dundy, judge of the District Court of the United States for the District of Nebraska, and one of the judges of the Circuit Court of the United States for the Eighth Judicial Circuit sitting, in said circuit court, at the term of November, A. D. 1881.

Be it remembered that on the 7th day of August, 1880, a petition was filed in said circuit court, which said petition is in words and figures following, to wit:

In the United States Circuit Court, District of Nebraska.
November Term, A. D. 1880.

MARSHAL FIELD, PLAINTIFF,
vs.
THE COUNTY OF DIXON, DEFENDANT. } Petition. At Law.

The plaintiff above named, for cause of action against the defendant above named, alleges and states:

That the plaintiff is a citizen of the State of Illinois, residing in Chicago, in said state.

That the county of Dixon is a body corporate duly organized and existing under and by virtue of the laws of the State of Nebraska, and is one of the counties in said state, and its powers are exercised under the law by a board of county commissioners; and said county possesses, and did possess at the various dates hereinafter mentioned, the powers granted by law to counties in said State of Nebraska.

That on or about the first day of January, 1876, the said county of Dixon, by its board of county commissioners, by an authority of an election of the voters of said Dixon County, held in the said county on the 27th day of December, 1875, and in *in* conformity with and under and by virtue of chapter 35 of the general statutes of the State of Nebraska and amendments thereto, and
3 the constitution of said state, article 12, adopted October, A. D. 1875, issued its negotiable bond, numbered five (5), whereby it acknowledged itself indebted and bound to and promised to pay unto the Covington, Columbus and Black Hills Railroad Company, a corporation then organized and incorporated under the laws of the State of Nebraska, the sum of one thousand dollars ($1,000) for value received, with interest at the rate of ten per cent. per annum, represented by interest coupons attached to said bonds, said interest payable semi-annually, on the first days of January and July in each year, at the office of the Farmers' Loan and Trust Company, in the city of New York, on the presentation and delivery to the said Farmers' Loan and Trust Company of the interest coupons thereto attached.

That said bond, by order of said board of county commissioners, was duly signed by the chairman of the board of county commissioners of Dixon County, Nebraska, attested by the county clerk of said county, with the seal of said county thereto attached.

That after the execution of said bond the same was presented, as by law required, to the auditor and secretary of the State of Nebraska, and the said officers, on the 2d day of October, 1876, having found and determined that said bond was issued pursuant to law, indorsed on the back of said bond a certificate, signed by them, that said bond was issued pursuant to law; and on the same day, said bond having been presented to said auditor of the State of Nebraska for registration pursuant to law, the said auditor duly registered said bond in his office, as by law provided, and, under his hand and seal, certified upon such bond the fact that the same had been regularly and legally issued and that the same had been registered in accordance with law.

That a copy of said bond, with all the certificates thereon made by said auditor and secretary, and all the indorsements thereon, is hereto attached, marked "Exhibit A," and made a part hereof.

4 That said bond, so issued and certified and registered, was one of a series of eighty-seven one thousand dollar bonds, issued by said county on said first day of January, 1876, in pursuance of said election and order of said county commissioners aforesaid, and all of said bonds of said series are the same and the certificates and indorsements thereon identical with the said bond number five (5) aforesaid, except as to the number thereof, said bonds being numbered from No. one (1) to eighty-seven (87), inclusive.

That the coupons hereinafter referred to and sued upon are cut and taken from said bonds of said series issued by said county.

That each and all of said bonds of said series, and all the coupons thereto attached, were sold and transferred before maturity for value, and at the time of the sale and transfer thereof the said certificates and indorsements thereon, as set forth in Exhibit "A," were on each of said bonds, and at the time of the purchase of the coupons hereinafter mentioned by plaintiff said certificates and indorsements were upon said bonds as set forth in Exhibit "A."

Count 1. That the defendants, on the first day of January, 1876, made and issued its interest coupon, numbered three (3), attached to the bond aforesaid, to wit, bond number five (5), by which said county obligated itself to pay to the bearer thereof the sum of fifty dollars ($50) on the first day of July, 1877. Said coupon is in words and figures following:

$50.00. DIXON COUNTY, NEBRASKA,

Will pay the bearer hereof, 3 at the Farmers' Loan and Trust Company, in the City of New York, on the first day of July, 1877, fifty dollars, for six months' interest on bond No. 5.

E. M. BISBEE, *County Clerk.*

And plaintiff states that he purchased said coupon before due for value, and he is now the owner thereof.

5 That after maturity thereof he presented the same for payment to the Farmers' Loan and Trust Company, in the city

of New York, and demanded payment thereof, and the same has been refused, and the said coupons is now due and unpaid, and there is due complainant thereon the sum of fifty dollars, with interest at ten per cent. from the first day of July, 1877. That in addition to said first cause of action said petition contained counts on ninety-nine other interest coupons cut from the same series of bonds and differing from the first only in number and amount, all of which counts are omitted in this transcript by direction of the plaintiff in error and in pursuance of the stipulation of parties filed herein, and which hereafter appears. Said petition then proceeds as follows:

6 That there is due on said coupons, with interest at ten per cent. thereon up to July 1, 1880, the sum of six thousand and sixty-seven and $\frac{50}{100}$ dollars ($6,067.50.)

Therefore the plaintiff prays judgment against the defendant for the sum of six thousand and sixty-seven and $\frac{50}{100}$ dollars, with interest at ten per cent. per annum and costs of suit.

MARSHALL FIELD.
By JOY & WRIGHT,
Att'ys for Plaintiff.

STATE OF NEBRASKA, } ss.
WOODBURY COUNTY, }

I, Craig L. Wright, being first duly sworn, depose and say, that I am a member of the firm of Joy & Wright, attorneys for plaintiff in the foregoing entitled action; that said action is founded on written instruments for the payment of money only, and such instruments are in the possession of deponent as such attorney; that the plaintiff is a non-resident of the State of Nebraska; that I have read the foregoing petition and know the contents thereof, and that the matter and things therein stated are true, as I verily believe.

CRAIG L. WRIGHT.

Subscribed and sworn to before me and in my presence by Craig L. Wright on this 6th day of August, 1880.

[SEAL.] T. G. HENDERSON,
Notary Public in and for Woodbury County, Iowa.

Upon the back of said petition appear endorsements in words and figures following, to wit: No. 381, E. In the United States Circuit Court, District of Nebraska. Marshall Field vs. The Board of County Commissioners of the County of Dixon. Petition. Filed Aug. 7th, 1880. Watson B. Smith, clerk. Joy & Wright, att'ys for plaintiff.

7 Thereupon afterwards, to wit, on the 6th day of September, 1880, an answer was filed in said case, which said answer is in words and figures following, to wit:

In United States Circuit Court for the District of Nebraska.

MARSHALL FIELD
vs.
THE COUNTY OF DIXON, DEFENDANT. } Answer.

And now the defendant answers the petition of the plaintiff, and says: That it admits that the plaintiff is a citizen of the State of Illinois, and that the defendant is a public corporation existing under the laws of the State of Nebraska, and a citizen of that state.

That it admits on the 21st day of December, 1876, said Dixon County issued the bonds and coupons described in plaintiff's petition, and the said bonds were registered and certified as set forth in and upon a copy of said bond attached to said petition and made a part thereof, and that the coupons declared on were attached to said bonds and have been cut therefrom. That said bonds were voted, issued, and delivered by said county of Dixon in aid of the promised construction of the Covington, Columbus and Black Hills Railroad Company, and upon the promise and agreement of said company to construct, maintain and operate its railroad into and through said county. That after obtaining possession of said bonds said company has failed, neglected, and refused to build, maintain and operate its said road as promised and agreed, and that the consideration for which said bonds has failed, and said county has received no consideration therefor. That said defendant, upon information and belief, denies that each and all of said bonds and coupons were sold and transferred before maturity for value, but alleges, upon information and belief, that at and before said alleged purchase of said bonds and coupons by said plaintiff or the payment of any
8 consideration therefor, said plaintiff had notice that said bonds had not been voted by the requisite majority of votes cast; that said bonds were voted without authority of law, as hereinafter stated; that the said county of Dixon received no consideration therefor, and that said company had failed to build, maintain and operate into and through said Dixon County as provided and agreed; and further, upon information and belief, denies that said plaintiff is the owner of said bonds and coupons, or paid any consideration therefor.

And defendant further answering, says that said bonds and coupons were issued by the board of county commissioner of Dixon County without authority of law, and that the same are void.

That the constitution of the State of Nebraska forbids and prohibits the making of donations to any railroad or other work on internal improvement, unless a proposition shall first be submitted to the qualified electors of the county proposing to make such donation at an election by authority of law; and further prohibits such donation and the submission of a proposition therefor to an amount exceeding in the aggregate ten per cent. of the assessed

valuation of such county; whereas, in truth and in fact, the donation represented in the issue of said bonds exceed the sum of ten per cent., and was equal to the sum of fifteen per cent. of the assessed valuation of said county, and was, therefore, void. Of which the plaintiff had notice to and before his alleged purchase of said bonds and coupons attached.

Defendant further says that, by the constitution of the State of Nebraska, all bonds or evidence of indebtedness issued in aid of the construction of railroads or other works of internal improvement are declared void, unless the same shall have endorsed thereon a certificate signed by the secretary and auditor of state showing that the same are issued pursuant to law, and that no such certificate was endorsed on said bond as required by said constitution.

9 Wherefore defendant prays that inasmuch as said bonds were without authority of law, and said county has received no consideration therefor, it be hence dismissed with it costs of suit.

A. J. POPPLETON,
J. M. THURSTON,
Att'ys for Deft.

STATE AND DISTRICT OF NEBRASKA, } *ss.*
DOUGLAS COUNTY, }

A. J. Poppleton, being first duly sworn, deposes and says, that he is one of the attorneys for the defendant above named, that he has read the foregoing answer and knows the contents thereof, and that the facts therein stated are true as he believes. That the defendant is a corporation organized and existing under the laws of the State of Nebraska.

A. J. POPPLETON.

Sworn to before me and signed in my presence, this 6th day of September, A. D. 1880.

[SEAL.] THOMAS McMURRAY,
Notary Public, Douglas County, Nebraska.

Upon the back of said answer appear endorsements in words and figures following, to wit: E. 381. U. S. Circuit Court, District of Nebraska. Marshall Field vs. The County of Dixon. Answer. Filed Sept. 6th, 1880. Watson B. Smith, clerk. Poppleton & Thurston, deft's attys.

Thereupon, afterwards, to wit, on the 25th day of September, 1880, a reply was filed in said case, which said reply is in words and figures following, to wit:

In the Circuit Court of the United States, District of Nebraska.

MARSHALL FIELD, PL'FF,
vs
THE COUNTY OF DIXON, DEFT. } Reply.

And now comes the plaintiff and for the reply to the answer
10 of the defendant herein—

I. Denies that the county of Dixon has received no consideration for the issuing of said bonds and coupons, and that consideration for which same were issued has failed. But avers the facts to be that, under the terms of the contract under which the said bonds were voted to the Covington, Columbus and Black Hills Railroad Company, the said company became entitled to have and receive the said bonds when the railroad which the said company were then constructing was completed and operated to the town of Ponca, the county seat of said Dixon County.

That before the said bonds were delivered to the said railroad company the said company had completed and were operating its road from the town of Covington, in Dakota County, to Ponca, in Dixon County, a distance of about twenty-seven miles. That the said railroad is now, and ever has been, operated ever since said bonds were issued. That the road-bed of said road has been graded nearly all the way from the said town of Ponca through the said county, and a part of the bridges built, and a large amount of material purchased for the completion of said road through the said county.

Plaintiff denies that he had notice before the purchase and payment therefor of said bonds and coupons, that they had not been voted by the requisite majority of votes.

And avers the facts to be that said bonds were voted by the requisite majority. And denies that he had any knowledge that said bonds were voted without any authority of law, and the said County of Dixon received no consideration therefor. And denies that he had any knowledge of the failure of the said company to build the said road and comply with the terms of said contract under which said bonds were voted; and denies that plaintiff had notice of any irregularity or illegality in the issuing of said bonds at the time of the purchase thereof.

11 Denies that said bonds and coupons were issued by the said County of Dixon without authority of law, and that the same are void.

And denies that the Constitution of the State of Nebraska prohibits the issuing of bonds in excess of ten per cent. upon the assessed valuation of said county.

Denies that he had any knowledge that the donation to said road, for which said bonds were issued, exceeded ten per cent. of the assessed valuation of said county at the time of the purchase and payment of said bonds; and denies that the said bonds are void by

reason thereof; and that he had any knowledge thereof at the time he purchased the same.

II. And, for further reply, this plaintiff denies that the said bonds are not properly certified by the secretary and auditor of state as by law provided, and that the same are void by reason thereof.

III. And, for a further reply, plaintiff says, defendant ought not to have and maintain its said answer and defence therein pleaded, for that, under the laws of Nebraska under which said bonds were issued, then and now in force, the said defendant was, and now is, estopped from pleading want of consideration for said bonds.

IV. And, for further reply, plaintiff says, that sec. 2, article 12, of the new Constitution of the State of Nebraska, now, and at the time said bonds were issued, in force, created the secretary and auditor of the State of Nebraska a tribunal to pass upon and determine whether the said bonds had been issued pursuant to law, and clothed the said secretary and auditor of state with full power and authority to pass upon and determine said question. That the said secretary and auditor, before said bonds were delivered to the Covington, Columbus and Black Hills Railroad Company, and before the same were purchased by the plaintiff, passed upon and decided that said bonds had been issued pursuant to law, and endorsed upon each of said bonds their certificate, certifying that said bonds
12 had been issued pursuant to law. Therefore, plaintiff says that defendant ought not to have and maintain its said answer and defence.

JOY & WRIGHT,
Att'ys for Plff.

STATE OF IOWA, }
WOODBURY COUNTY, } *ss.*

I, Craig L. Wright, being duly sworn, on oath depose and say, that I am a member of the firm of Joy & Wright, who are attorneys for the plaintiff in the above-entitled action; that said plaintiff is a non-resident of the state of Iowa, and now absent therefrom; that I have read the foregoing reply, and know the contents thereof, and the facts therein stated are true to the best of my knowledge, information, and belief.

CRAIG L. WRIGHT.

Subscribed and sworn to before me and in my presence by said Craig L. Wright, on this day of September, A. D. 1880.

[SEAL.] J. E. DWIGHT,
Notary Public in and for Woodbury Co., Iowa.

Upon the back of said reply appear endorsements in words and figures following, to wit: No. 381 E. In the United States Circuit Court, Dist. of Nebraska. Marshall Field, plaintiff, *vs.* The

County of Dixon, deft. Reply. Filed Sept. 25, 1880. Watson B. Smith, clerk.

Thereupon, afterwards, at the May term of said court, on the 8th day of June, 1881, the following proceedings were had in said case, as appears of record, on folio 163, Journal G, of said court:

MARSHALL FIELD
vs.
THE COUNTY OF DIXON. } Jury empaneled.

Now comes the parties herein, by their attorneys, also come the following-named persons as jurors, to wit: J. S. McCormick, E. L. Stone, J. H. Butler, J. M. Simeral, W. J. Cuddy, and C. J.
13 Westerdahl, who were duly empaneled and sworn according to law. The parties agreeing to try said case before the court and said six jurors, and the said jury having heard the testimony adduced in part, said cause was continued until to-morrow morning at ten o'clock.

Thereupon, afterwards, at the said May term of said court, on the 9th day of June, 1881, the following proceedings were had in said case, as appears of record, on folio 165, Journal G, of said court:

MARSHALL FIELD
vs.
THE COUNTY OF DIXON. } Trial continued.

This day again came the said parties, by their attorneys, also came the six jurors heretofore empaneled and sworn herein, and the said jury having heard the remaining testimony, the argument, and charge of the court, retire to their room, in charge of a bailiff duly sworn, for deliberation. The parties herein consenting thereto, the court ordered that if said jury do not agree upon a verdict before one o'clock this day, they may return the same sealed to this court to-morrow morning at ten o'clock.

Thereupon, afterwards, at the said May term of said court, on the 10th of June, 1881, the following proceedings were had in said case, as appears of record, on folio 168, Journal G, of said court:

MARSHALL FIELD
vs.
THE COUNTY OF DIXON. } Verdict.

The jury heretofore empaneled herein and sworn herein, having returned to the court their sealed verdict, by the consent of the parties and order of the court, same was this day opened and read in open court by the clerk, and is in words and figures following, to wit:

In the Circuit Court of the United States, District of Nebraska.

14 MARSHAL FIELD, PLAINTIFF,
vs.
THE COUNTY OF DIXON, DEFENDANT.

We, the jury empaneled in the above-entitled cause upon the issues joined therein, do, under the instruction of the court, find as follows:

I. That the bonds from which the coupons in suit are cut, and a true copy of which is attached to the petition in this action, were issued and delivered to the Covington, Columbus and Black Hills Railroad Company January 1, 1876, in pursuance to a single proposition submitted to the electors of said county at an election held on the 27th day of December, 1875; and that the amount of said bonds so voted at said election and on said single proposition was in excess of ten per cent. of the assessed valuation of all the taxable property of said county at last previous assessment and valuation made in the spring of 1875, and which continued in force until the spring of 1876, and amounting to nearly fifteen per cent. of said valuation.

J. M. SIMERAL, *Foreman.*

II. That said assessed valuation so made in the spring of 1875, and on which said bonds were voted, and which was shown and appeared from the books of public record of said county after such valuation and assessment had been made in the spring of 1875, was five hundred and eighty-seven thousand three hundred and thirty-one dollars and no more.

J. M. SIMERAL, *Foreman.*

III. That 60 of the coupons in the sum of fifty dollars each were purchased by the plaintiff of D. T. Hedges, after the same were due and with knowledge on his part that the defendant had failed and refused to pay the same.

J. M. SIMERAL, *Foreman.*

IV. That 10 of the coupons were purchased by the plaintiff
15 of Levi L. Leiter, after the same were due, who owned the bonds from which the same were cut, and who was a *bona fide* holder of the same, without notice, and who had no notice of the assessed valuation of Dixon County at the time he purchased the same.

J. M. SIMERAL, *Foreman.*

V. We find the amount due upon the coupons in suit to be six thousand dollars ($6,000).

J. M. SIMERAL, *Foreman.*

VI. We find that Daniel T. Hedges, from whom sixty of the coupons in suit were cut, was an innocent purchaser of the bonds

from which the coupons in suit were cut, for value, before the said bonds or coupons became due.

J. M. SIMERAL, *Foreman.*

VII. We find that Marshall Field purchased the bonds now held by him, from which the thirty coupons in suit were cut before the maturity of the said bonds and coupons, for value, without notice of any defenses to said bonds and coupons.

J. M. SIMERAL, *Foreman.*
J. S. McCORMICK,
E. L. STONE,
JOHN H. BUTLER,
W. J. CUDDY,
E. J. WESTERDAHL.

Thereupon, afterwards, at the May term of said court, on the 1st day of September, 1881, the following proceedings were had in said case, as appears of record, on folio 214, Journal G, of said court:

MARSHALL FIELD
vs.
THE COUNTY OF DIXON. } Judgment on Verdict.

This cause having been heretofore submitted to the court on the motion of said plaintiff for judgment on the verdict rendered on a former day of this term, it is now on this day consid-
16 ered by the court that said motion is well taken and same is hereby sustained.

It is therefore ordered and adjudged by the court that the said plaintiff, Marshall Field, recover from the said defendant, the county of Dixon, the said sum of six thousand dollars ($6,000.00), with his costs herein expended, and that execution issue therefor; to which ruling and judgment of the court the defendant excepts.

Thereupon, afterwards, at the May term of said court, on the 14th day of October, 1881, the following proceedings were had in said case, as appears of record, on folio 271, Journal G, of said court:

MARSHALL FIELD, PLAINTIFF,
vs.
THE COUNTY OF DIXON, DEFENDANT.

This day came the said defendant, by its attorney, A. J. Poppleton, and moves the court to extend the time for preparing and filing its bill of exceptions in this cause, and the court being satisfied that said motion should be sustained, the same is accordingly granted and said time extended forty days from date.

Thereupon, afterwards, to wit, on the 30th day of November, 1881, a bill of exceptions was filed in said case, which said bill of exceptions is in words and figures following, to wit:

In the Circuit Court of the United States for the District of Nebraska.

MARSHALL FIELD, PLAINTIFF,
vs. } 381 E.
THE COUNTY OF DIXON, DEFENDANT.

Be it remembered that on the trial of this cause in said court at the May term, A. D. 1881, the bond declared on in the petition in said cause having been admitted in evidence, of which the following is a true copy, and is conceded by both parties, plaintiff and defendant, to be a true copy:

17 EXHIBIT "A."

No. 5. United States of America, $1000.

State of Nebraska, County of Dixon.

Interest ten per cent. per annum, payable semi-annually, on the first days of January and July, at the Farmers' Loan and Trust Company, in the city of New York.

Know all men by these presents that the county of Dixon, in the State of Nebraska, acknowledges itself indebted and firmly bound to the Covington, Columbus and Black Hills Railroad Company in the sum of one thousand dollars, which sum the said county, for value received, hereby promises to pay to the said railroad company, or bearer, at the Farmers' Loan and Trust Company in the city of New York, on the first day of January, 1896, together with interest thereon from the first day of January, 1876, until paid, at the rate of ten per cent. per annum, which interest shall be payable semi-annually on the first days of January and July of each year, upon the presentation and delivery at the said Farmers' Loan and Trust Company of the coupons of interest hereto severally attached.

This bond is one of a series of eighty-seven thousand dollars issued under and in pursuance of an order of the county commissioners of the county of Dixon, in the State of Nebraska, and authorized by an election held in the said county on the twenty-seventh day of December, A. D. 1875, and under and by virtue of chapter 35 of the General Statutes of Nebraska and amendments thereto, and the constitution of the said state, article 12, adopted October, A. D. 1875.

In testimony whereof the county commissioners have caused these presents to be signed by the chairman of the board, and attested by the clerk of the said county, and affixed the seal of
18 the said county, at Ponca, the county seat, this 1st day of January, A. D. 1876. W. H. CLARK,

Chairman of the Board of County Commissioners of Dixon County, Nebraska.

Attest: E. M. BISBEE,

County Clerk, Dixon County, Nebraska.

[Seal of Dixon County, Nebraska.]

Endorsements: No. 5. $1,000. State of Nebraska, county of Dixon, 10 per cent. 20 years bond, certified to by the secretary and auditor of state, and principal and interest guaranteed by the Covington, Columbus and Black Hills Railroad Company. Principal payable first January, 1896. Interest semi-annually on the first days of January and July, at the Farmers' Loan and Trust Company in the city of New York.

Extract from the constitution of Nebraska and the general statutes of the state, authorizing the issue of these bonds:

Constitution of Nebraska.

ART. 12. No city, county, town, or other subdivision of the state, shall ever make donations to any railroad, unless a proposition so to do shall have been first submitted to the qualified electors thereof, at an election by authority of law, and no bonds or evidence on indebtedness so issued shall be valid unless the same shall have endorsed thereon a certificate signed by the secretary and auditor of state, showing that the same is issued pursuant to law.

Chapter 35, General Statutes of Nebraska.

SEC. 1. Any county or city is hereby authorized to issue bonds in aid of any railroad, provided the county commissioners shall first submit the question to a vote of the legal electors of the said county.

SEC. 2. The proposition of the question must be accompanied by a provision to levy a tax for the payment of the principal
19 and interest of said bonds in addition to the usual taxes.

SEC. 6. Any county which shall have issued its bonds in pursuance of this chapter shall be estopped from pleading want of consideration therefor, and the proper officers may be compelled, by mandamus or otherwise, to levy the tax herein provided, to pay the same (acts of 1875, sec. 3, page 170) whenever the holder of county bonds shall present the same to the auditor of state for registration. The auditor, upon being satisfied that the same are issued according to law, shall register the same in his office, in a book kept for that purpose, and shall, under his seal of office, certify upon such bond the fact that they have been legally and regularly issued, and that such bonds have been registered in his office in accordance with the provisions of this act.

SEC. 4. Whenever any of the bonds of any county shall be so registered, the auditor of the state shall annually, on or before the second Monday of June in each year, ascertain the amount of sinking fund and interest accrued and to accrue (before the tax for the next succeeding year shall be levied) upon all bonds registered in his office, and shall certify the amount therefor to the clerk of the county in which such bonds were issued.

SEC. 5. The clerk of any county upon receiving such certified statement from the auditor of state shall proceed to ascertain from the assessment roll of such county the amount of taxable property, and what percentage is required to be levied to pay said interest and create a sinking fund, in compliance with the certificate of the said auditor, and shall levy such percentage upon the taxable property of said county, and the said taxes shall be collected by the county treasurer, in the same manner as other taxes are collected.

Certificate of the County Clerk.

This certifies that the issue of bonds, of which this is one, amounting in all to eighty-seven thousand dollars, is the only issue of bonds that has ever been made by the said count.

The question of issuing said bonds was submitted to the people of the county by a resolution of the county commissioners, dated Nov. 24, 1875, in the following form: Shall Dixon County issue to the Covington, Columbus and Black Hill Railroad Company $87,000 ten per cent. twenty years bonds, payable, both principal and interest, in New York City; and shall a tax be annually levied in addition to the usual taxes sufficient to pay interest as it comes due, and accumulate a sinking fund to pay the principal at maturity?

This question was decided by a vote taken Dec. 27, 1875, of 462 votes for, 120 against.

Witness my hand and official seal, this 16 day of May, A. D. 1876.

[SEAL.] E. M. BISBEE,
County Clerk.

For value received the Covington, Columbus and Black Hills Railroad Company hereby guarantees to the holder hereof the payment of the principal and interest of the within bond, according to the tenor thereof, at the places where and as the same become due and payable.

In witness whereof the said Covington, Columbus and Black Hills Railroad Company has caused its common seal to be hereto affixed, and the same to be attested by its president, the 3rd day of October, one thousand eight hundred and seventy-six.

[SEAL.] A. W. HUBBARD,
President Covington, Columbus & Black Hills Railroad Company.

STATE OF NEBRASKA, LINCOLN, *Oct.* 2, 1876.

We certify that this bond is issued pursuant to law.

BRUNO TZSCHOOK,
Secretary of the State of Nebraska.
J. B. WESTON.

21 *Auditor of the State of Nebraska.*

STATE OF NEBRASKA, } ss.
AUDITOR'S OFFICE, }

I, J. B. Weston, auditor of state, do hereby certify that upon the basis of the data filed in my office, it appears that the attached bond No. —— has been regularly and legally issued by the county of Dixon to Covington, Columbus and Black Hills Railroad Company, and said bond, upon presentation thereof by said company, has this day been duly registered in my office, in accordance with the provisions of an act entiled "An act to authorize the registration, collection, and redemption of county bonds, approved February 25th, 1875."

In witness whereof, I have hereunto set my hand and affixed my seal of office, at Lincoln, this 2d day of October, 1876.

J. B. WESTON,
Register No. —, vol. —, page —. *Auditor of State.*

[Seal of the State of Nebraska.]

The defendant, to maintain the issues on its part, offered as witnesses, Dennis Hurley, treasurer of said county, and E. M. Bisbee, clerk of said county, who testified, among other things:

"That the total valuation of the entire taxable property of said county of Dixon of all kinds for the year of 1875, was the sum of ($587,331) five hundred eighty-seven thousand three hundred and thirty-one dollars, and that no other assessment was made subsequently to said assessment of the year 1875, and prior to the voting and issuing of the bonds from which the coupons in controversy in this suit were cut.

That such valuation and assessment of the entire taxable property of said county for said year, as well as for subsequent and preceding years, was matter of public record in the office
22 of the clerk and treasurer of said county, and open and accessible to all persons desiring access thereto.

That thereupon, after such testimony, among other, had been given, the court submitted the said cause to the jury for its findings under the following charge:

Gentlemen of the Jury: You are expected to prepare a special verdict, which will dispose of the controversy. It is not a question of law upon which you will pass, and therefore there is no instruction necessary except this: you will find whether or not Mr. Leiter, who owned five thousand of the bonds, was a *bona fide* purchaser for value without notice of defect in the bonds. You will pass directly upon the several propositions submitted.

I believe there is no real controversy about the valuation, because in the bonds themselves was a proposition to vote 15 per cent. of the valuation. If this is correct you will so find; if it is

not correct, then you will change it to suit the facts; change a few words to make it consistent with the facts either way.

The parties agree that the jury may bring in a sealed verdict.

That in pursuance of said charge, said jury rendered the following special verdict:

We, the jury empaneled in the above-entitled cause upon the issues joined therein, do, under the instruction of the court, find as follows:

I. That the bonds from which the coupons in suit are cut, and a true copy of which is attached to the petition in this action, were issued and delivered to the Covington, Columbus and Black Hills Railroad Company, January 1, 1876, in pursuance of a single proposition submitted to the electors of said county at an election
23 held on the 27th day af Dec., 1875; and that the amount of said bonds so voted at said election and on said single proposition, was in excess of 10 per cent. of the assessed valuation of all the taxable property of said county at the last previous assessment and valuation made in the spring of 1875, and which continued in force until the spring of 1876, and amounting to nearly fifteen per cent. of said valuation.

J. M. SIMERAL, *Foreman.*

II. That said assessed valuation so made in the spring of 1875, and on which said bonds were voted, and which was shown and appeared from the books of public record of said county after such valuation and assessment had been made in the spring of 1875, was five hundred and eighty-seven thousand three hundred and thirty-one dollars, and no more.

J. M. SIMERAL, *Foreman.*

III. That sixty of the coupons, in the sum of fifty dollars each, were purchased by the plaintiff of D. T. Hedges after the same were due, and with knowledge on his part that the defendant had failed and refused to pay the same.

J. M. SIMERAL, *Foreman.*

IV. That ten of the coupons were purchased by the plaintiff of Levi L. Leiter after the same were due, who owned the bonds from which the same were cut, and who was a bona-fide holder of the same without notice, and who had no notice of the assessed valuation of Dixon County at the time he purchased the same.

J. M. SIMERAL, *Foreman.*

V. We find the amount due upon the coupons in suit to be six thousand dollars ($6,000).

J. M. SIMERAL, *Foreman.*

VI. We find that Daniel T. Hedges, from whom sixty of the coupons in suit were cut, was an innocent purchaser of the bonds
24 from which the coupons in suit were cut for value before the said bonds or coupons became due.

J. M. SIMERAL, *Foreman.*

VII. We find that Marshall Field purchased the bonds now held by him, from which the 30 coupons in suit were cut, before the maturity of the said bonds and coupons, for value, without notice of any defences to said bonds and coupons.

J. M. SIMERAL, *Foreman.*
J. S. McCORMICK.
JOHN H. BUTLER.
E. L. STONE.
W. J. CUDDY.
C. J. WESTERDAHL,

Whereupon the court, on the 30th day of September, 1881, after having heard the argument of counsel, rendered judgment for the plaintiff for the amount claimed in his petition, to which judgment of the court defendant then and there excepted, for the reason that said judgment was not justified by the special findings of said jury, in this, that it appeared that plaintiff, before the purchase of said bonds, had notice, by reason of public record, of the assessed valuation of all the taxable property in said county. That such assessed valuation was not sufficient to sustain the said bonds so issued upon said assessed valuation, and in pursuance of the vote alleged in plaintiff's petition, and were, therefore, absolutely void; and prays that this bill of exceptions in that behalf might be allowed, which is accordingly done and ordered to be made a part of the record of this cause.

ELMER S. DUNDY, *Judge.* [SEAL.]

Upon the back of said bill of exceptions appear endorsements in words and figures following, to wit: No. 381, E. U. S. Circuit Court, District of Nebraska. Marshall Field vs. The County of Dixon. Bill of Exceptions. Filed Nov. 30, 1881. Elmer D. Frank, clerk.

Thereupon, afterwards, to wit, on the 26th day of May, 1882, a stipulation was filed in said case, which said stipulation is in words and figures following, to wit:

In the Supreme Court of the United States.

25 THE COUNTY OF DIXON, PLAINTIFF IN ERROR,
vs.
MARSHALL FIELD, DEFENDANT IN ERROR. } Stipulation.

It is hereby stipulated and agreed by and between the respective parties that all the counts upon coupons constituting separate causes of action, subsequent to the first count contained in the petition in this cause, may be omitted from said petition by the clerk in making his transcript for the Supreme Court, said omitted counts being ninety-nine in number, and being identical with the first, except in number and except number of coupons sued upon, and bonds from which the respective coupons are taken, and that such transcript of the petition may be incorporated with the record and used as the

original in the Supreme Court of the United States, the same as if said petition was incorporated with said transcript entire.

JOY & WRIGHT,
Attorneys for Def't in Error.
A. J. POPPLETON,
Counsel for Plaintiff in Error.

Upon the back of said stipulation appear endorsements in words and figures following, to wit: No. 381 E. In Circuit Court United States, Dist. of Neb. The County of Dixon, pl'ff in error, vs. Marshall Field, def't in error. Stipulation. Filed May 26, 1882. Elmer D. Frank, clerk.

Thereupon, afterwards, to wit, on the 29th day of May, 1882, a writ of error was allowed and citation issued in said case, of which the following are the originals:

26 UNITED STATES OF AMERICA, } ss.
DISTRICT OF NEBRASKA, }

The President of the United States of America to the Honorable the Judges of the Circuit Court of the United States for the District of Nebraska, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, between Marshall Field, plaintiff, and the county of Dixon, defendant, a manifest error hath happened, to the great damage of the said defendant in the said cause, as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States shall be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, at Omaha, in said district, this 29th day of May, 1882.

[SEAL.] ELMER D. FRANK, *Clerk.*

Allowed by— ELMER S. DUNDY, *Judge.*

(Endorsed:) No. 381, E. United States Circuit Court, District of Nebraska. The County of Dixon, plaintiff in error, vs. Marshall Field, def't in error. Writ of error. Filed May 29, 1882. Elmer D. Frank, clerk.

27 THE UNITED STATES OF AMERICA, } ss.
DISTRICT OF NEBRASKA, }

To Marshall Field, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, on the second Monday of October next, pursuant to a writ or error filed in the clerk's office of the Circuit Court of the United States for the District of Nebraska, wherein the county of Dixon is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at Omaha this 29th day of May, 1882.

ELMER S. DUNDY, *Judge.*

Service of the above citation is hereby acknowledged this 1st day of June, 1882.

JOY & WRIGHT,
Att'ys for Plff.

(Endorsed:) No. 381, E. United States Circuit Court, District of Nebraska. The County of Dixon, plaintiff in error, vs. Marshall Field, def't in error. Citation. Filed June 3, 1882. Elmer D. Frank, clerk.

28 UNITED STATES OF AMERICA, } ss.
DISTRICT OF NEBRASKA, }

I, Elmer D. Frank, clerk of the Circuit Court of the United States for the Eighth Judicial Circuit and District of Nebraska, certify that the forgoing folios from 1 to 28 contain true and faithful transcripts from the records and files of said court in the case of Marshall Field vs. The County of Dixon, State of Nebraska, and that a copy of the writ of error and citation has been lodged and remains in my office. I further certify that the petition of said plaintiff contains one hundred counts, differing from the first only in number of count and number of coupon.

Witness my hand and the seal of said circuit court, at Omaha, this 19th day of June, 1883.

[SEAL.] ELMER D. FRANK, *Clerk.*

(Endorsed on cover:) Nebraska C. C. U. S. No. 582. The County of Dixon, in *in* the State of Nebraska, Plaintiff in Error, vs. Marshall Field. Filed 7th August, 1882.

111-83

IN THE

Supreme Court of the United States,

No. 582.

THE COUNTY OF DIXON,
Plaintiff in Error,

vs.

MARSHALL FIELD,
Defendant in Error.

BRIEF AND POINTS FOR PLAINTIFF IN ERROR.

STATEMENT.

This is a suit brought to recover upon one hundred interest coupons of $50 each, alleged to be the property of the plaintiff.

The bonds from which the coupons in question are cut, were issued by the county of Dixon, in the state of Nebraska, in aid of the construction of the Covington, Columbus and Black Hills railroad, and under a proclamation of the commissioners of Dixon county, appointing an election for that purpose on the 27th day of December, 1875. The amount of bonds to be issued was $87,000 par value, being eighty-seven bonds of $1,000 each. They were to run twenty years, the interest to be ten per cent. per annum, payable semi-annually on the first days of January and July of each year, at the office of the Farmers' Loan and Trust Company in the city of New York.

The bonds having been voted, as claimed, by the requisite majority of two-thirds of the qualified voters,

and the proposition upon which they were voted providing that upon the completion of the road to Ponca, in said county, twenty bonds should be delivered, and upon completion of certain grading, the balance of the issue, the county commissioners assuming or deciding that the conditions had been complied with, issued and delivered the bonds to the railway company.

Testimony showing that nothing further was ever done, either in grading or the construction of the road, was ruled out upon the trial. Verdict for the plaintiff below.

At the time the bonds were voted and issued, the constitution of the state prohibited the issue of bonds in aid of works of internal improvement to an amount exceeding ten per cent. of the assessed valuation of the taxable property of the county, but contained a proviso that such ten per cent. indebtedness might be *increased* five per cent. by a two-thirds vote. With these provisions in force, the county voted such aid at a single submission and in a single indebtedness to the amount of fifteen per cent. of its assessed valuation. Such valuation was found by the jury to be $587,331. The amount of bonds voted was $87,000 (par value), exceeding ten and nearly equalling fifteen per cent.

The defense was that the bonds so voted were absolutely void, even in the hands of a bona fide holder for value.

CONSTITUTION AND LAWS OF THE STATE ON WHICH THE VALIDITY OF THE BONDS IN CONTROVERSY RESTS.

Section 2, Article 12, Constitution Compiled Statutes, p. 34:

SEC. 2. No city, county, town, precinct, municipality or other subdivision of the state, shall ever make donations to any railroad or other works of internal improvement, unless a proposition so to do shall have

been first submitted to the qualified electors thereof at an election by authority of law; *Provided*, That such donations of a county, with the donations of such subdivisions, in the aggregate shall not exceed ten per cent. of the assessed valuation of such county; *Provided further*, That any city or county may, by a two-thirds vote, increase such indebtedness five per cent., in addition to such ten per cent., and no bonds or evidences of indebtedness so issued shall be valid unless the same shall have endorsed thereon a certificate signed by the secretary and auditor of state, showing that the same is issued pursuant to law.

Sections 1 and 4 of Compiled Laws of Nebraska, p. 324.

SEC. 1. That any county or city in the state of Nebraska is hereby authorized to issue bonds to aid in the construction of any railroad or other work of internal improvement, to an amount to be determined by the county commissioners of such county or the city council of such city, not exceeding ten per centum of the assessed valuation of all taxable property in said county or city; *Provided*, The county commissioners, or city council, shall first submit the question of the issuing of such bonds to a vote of the legal voters of said county or city in the manner provided by chapter 9 of the revised statutes of the state of Nebraska for submitting to the people of a county the question of borrowing money.

SEC. 4. If two-thirds of the votes cast at any such election for the purposes herein set forth be in favor of the propositions submitted, the county commissioners in case of a county, and the city council in the case of a city, shall cause the proposition and result of the vote to be entered upon the records of said county or city, and a notice of its adoption to be published for two successive weeks in any newspaper in said county or city, if there be one, and

shall thereupon issue said bonds which shall be and continue a subsisting debt against such county or city until they are paid and discharged.

THE SPECIAL VERDICT (RENDERED BY DIRECTION OF THE COURT) IS AS FOLLOWS:

We, the jury empanelled in the above entitled cause upon the issues joined therein, do, under the instructions of the Court, find as follows:

I.

That the bonds from which the coupons in suit are cut, and a true copy of which is attached to the petition in this action, were issued and delivered to the Covington, Columbus and Black Hills Railroad Company, January 1, 1876, in pursance of a single proposition submitted to the electors of said county at an election held on the 27th day of December, 1875, and that the amount of said bonds so voted at said election and on said single proposition was in excess of ten per cent. of the assessed valuation of all the taxable property of said county at the last previous assessment and valuation made in the spring of 1875, and which continued in force until the spring of 1876, and amounted to nearly fifteen per cent. of said valuation.

J. M. SIMERAL, Foreman.

II.

That said assessed valuation, so made in the spring of 1875, and on which said bonds were voted, and which was shown and appeared from the books of public record of said county after such valuation and assessment had been made in the spring of 1875, was five hundred and eighty-seven thousand, three hundred and thirty-one dollars, and no more.

J. M. SIMERAL, Foreman.

III.

That sixty of the coupons, in the sum of fifty dollars each, were purchased by the plaintiff of D. T. Hedges, after the same were due, and with knowledge on his part that the defendant had failed and refused to pay the same.

J. M. SIMERAL, Foreman.

IV.

That ten of the coupons were purchased by the plaintiff of Levi Leiter, after the same were due, who owned the bonds from which the same were cut, and who was a bona fide holder of the same without notice, and who had no notice of the assessed valuation of Dixon county at the time he purchased the same.

J. M. SIMERAL, Foreman.

V.

We find the amount due upon the coupons in suit to be six thousand dollars ($6,000).

J. M. SIMERAL, Foreman.

VI.

We find that Daniel T. Hedges, from whom sixty of the coupons in suit were purchased, was an innocent purchaser of the bonds from which the coupons in suit were cut for value before the said bonds or coupons became due.

J. M. SIMERAL, Foreman.

VII.

We find that Marshall Field, purchased the bonds now held by him, from which the thirty coupons in suit were cut, before the maturity of the said bonds and coupons for value without notice of any defenses to said bonds and coupons.

J. M. SIMERAL, Foreman.

J. S. McCORMICK, E. L. STONE,
JOHN H. BUTLER, W. J. CUDDY,
C. J. WESTERDAHL.

THE ATTENTION OF THE COURT IS SPECIALLY CALLED TO THE FOLLOWING EXTRACT FROM THE BILL OF EXCEPTIONS:

The defendant to maintain the issues on its part offered as witnesses Dennis Hurley, treasurer of said county, and E. M. Bisbeen, clerk of said county, who testified among other things:

That the total valuation of the entire taxable property of said county of Dixon, of all kinds, for the year of 1875, was the sum of five hundred and eighty-seven thousand three hundred and thirty-one dollars ($587,331), and that no other assessment was made subsequent to said assessment of the year 1875, and prior to the voting and issuing of the bonds from which the coupons in controversy in this suit were cut.

That such valuation and assessment of the entire taxable property of said county, for said year, as well as for subsequent and preceding years, was matter of public record in the office of the clerk and treasurer of said county, and open and accessible to all persons desiring access thereto.

ASSIGNMENT OF ERRORS.

I.

The Court erred in entering judgment upon the special finding of facts for the plaintiff.

II.

The Court erred in holding that the public record of the assessed valuation of the taxable property of the county on which bonds were voted, to-wit: that for the year 1875, was not notice to the purchasers of the invalidity of the bonds, and that the purchaser was not bound to take notice thereof, but might lawfully rely upon the recitals contained in the bonds.

I.

Upon the language of the constitution and the construction thereof as settled by the Supreme Court of Nebraska, there is no room for doubt that as against any other than a bona fida holder for value the bonds in controversy are void for the reason that the amount voted is in excess of the constitutional limit of power to aid internal improvements.

This is the plain import of section 2, of article 12, of the constitution.

The subject of the sections is donations in aid of railroads and other works of internal improvement.

Its aim is not to grant powers but to impose limitations. It was manifestly framed with reference to legislation in force at the time of its adoption. All the provisions of the statutes hereinbefore set out were in force previous to its adoption. The limitations imposed are, (a) that a proposition for donation shall first be submitted to an election; (b) that the amount of donation shall not exceed ten per cent. of the assessed valuation of the county. Then follows a further proviso, that the indebtedness previously permitted by the existing limitation of ten per cent. may be increased to fifteen per cent. by a two-thirds vote.

The power to increase an indebtedness necessarily imports an existing indebtedness, and no existing indebtedness of this character can exist except by a vote of the electors of the county at a lawful election.

It is not in any manner denied, but on the contrary expressly conceded and admitted, that no such previous indebtedness to any amount or to any percentage existed at the time the bonds in controversy were authorized.

The claim is that the second proviso of section 2, of article 12, is a grant of power to vote bonds to the amount of fifteen per cent. of the taxable valuation of said county in the first instance and at a single vote.

It seems the plain spirit and intent of the constitution that the electors shall have the right to pass separately and distinctly upon the two questions of creating and increasing an indebtedness. It may well be that a two-third vote could be obtained for fifteen per cent., when the question of that or nothing was presented, when they would not vote to increase an already existing indebtedness of ten per cent. to fifteen per cent. It is the policy of the law to require a distinct and plain presentation of the exact question to be voted, freed as much as possible from all collateral or double questions.

> Lewis vs. Com'rs Bourbon Co., 12 Kansas 186.
> Fulton Co. vs. M. & W. R. R. Co., 21 Ill., 373;
> 22 Ill., 147; 27 Ill., 310; 3 Clark, Iowa, 311.

But the construction of this clause of the constitution has been settled by the Supreme Court of the state and is not open for discussion here. The case of Reinman vs. C. B. H. & C. R. Co., 7 Neb., P. 310, which was a suit to enjoin issue, deals with this exact question, and in a suit involving bonds similar to those in controversy, voted under like circumstances, under like laws and to the same company.

The syllabus of that case (prepared by the Court) is in part as follows:

"As the law stands there is no warrant for creating a county indebtedness, in aid of internal improvements, exceeding in the aggregate ten per cent. of the assessed value of the taxable property within the county. And even this must have been authorized by at least

two-thirds of all the votes cast on the proposition to extend such aid."

"Where a county votes aid to a railroad company in excess of the amount authorized by law, it is simply a void act, conferring no authority on the county commissioners to issue the bonds of the county in any amount whatever."

In that case the construction of this clause of the constitution is fully considered, and the matters here involved settled.

The Court say:

"We conclude, therefore, that, until the legislature shall by suitable act change the existing statutory law so as to authorize it, there is no warrant for creating a county indebtedness, in aid of internal improvements, exceeding in the aggregate ten per cent. of the assessed value of the taxable property within the county furnishing such aid. And further, that by the amendment of February 17, 1875, such aid must have been authorized by at least two-thirds of all the votes cast on the proposition to extend such aid."

Here is a positive adjudication of the Court, that under the constitution and laws of Nebraska, as they existed at the date of voting and issuing the bonds in controversy, there was an absolute and total lack of power to create an indebtedness in excess of ten per cent. of assessed valuation. And the Court further goes on to decide that in the absence of such power the proposition for fifteen per cent., and the election held thereon, was simply a void act, conferring no authority whatever to issue bonds to any amount.

The Court further say:

"It was further urged that even if it should be held that the proposition, as submitted to the electors, was in excess of the amount authorized to be voted, still to the amount of at least ten per cent. of the valuation it was valid, and to that extent the

contract between the county and the railroad company should be upheld. In support of this proposition we are referred to several authorities, particularly the case of Leavitt vs. Palmer, 3 N. Y., 19, which hold to the well established doctrine, that where a contract contains distinct provisions, some of which are legal and others illegal, the former, under certain circumstances, will be upheld, although the latter are declared void. 1 Parsons on Contracts, 380. But the case before us is clearly not within this rule. The proposition submitted to the electors was an entirety and indivisable. It exceeded the statutory limit, and was therefore wholly unauthorized. The election was simply a void act, conferring no authority whatever upon the board of county commissioners to issue the bonds of the county in any amount whatever."

"In the view which we take of the case it becomes unnecessary to determine whether, under the constitution, even if the legislature had authorized it, the whole amount of the fifteen per cent. of the valuation can be donated to a single enterprise and be voted at one election, and therefore we abstain from the expression of an opinion upon that question. But it may not be entirely out of place to suggest that we have not as yet been able to discover how it is possible to increase an indebtedness, which as yet has no existence."

Here, then, is a sweeping denial of any power or authority whatever, under any circumstances, or upon any procedure whatever, to issue bonds in aid of internal improvements, of the exact character of those in controversy.

Applying the settled rule that the adjudications of the highest Court of the state, construing its own constitution and laws, is conclusive upon this court, these bonds are void for lack of power to issue—a

question always open, even in the hands of a bona fide holder for value.

The remaining question is, is the county estopped from interposing this defense?

II.

The recitals contained in the bonds in controversy are insufficient upon settled adjudications of this Court to work an estoppel against the county.

We are familiar with the judgment of the Court upholding municipal bonds, otherwise void, upon the doctrine of estoppel, but we insist this case is not governed by these decisions, and is clearly distinguishable therefrom, both upon principle and authority.

That doctrine is well and briefly stated in Kennicott vs. Supervisors, 16 Wall, 452, as follows:

"If an election or other fact is required to authorize the issue of the bonds of a municipal corporation, and if the result of that election, or the existence of that fact, is by law to be ascertained and declared by any judge, officer, or tribunal, and that judge, officer, or tribunal, on behalf of the corporation, executes or issues the bonds, with a recital that the election has been held, or that the fact exists, or has taken place, this will be sufficient evidence of the fact to all bona fide holders of the bonds."

"If there be lawful authority for the municipality to issue its bonds, the omission of formalities and ceremonies, or the existence of fraud on the part of the agents of the municipality issuing the bonds, cannot be urged against a bona fide holder seeking to enforce them."

It will be noted that the jury specially find that the assessed valuation of said county, on which the bonds were issued, as well as that of all preceding years, was "matter of public record in the office of the clerk and

treasurer of said county, and open and accessible to all persons desiring access thereto."

The bond is in ordinary form, and that portion of it which, if any, must work an estoppel, is in these words:

"This bond is one of a series of eighty-seven thousand dollars, *issued under and in pursuance of an order of the county commissioners* of the county of Dixon, in the state of Nebraska, and authorized by an election held in the county on the 27th day of December, 1875, and under and by virtue of chapter 35, of the general statutes of Nebraska, and amendments thereto, and the constitution of the said state, article 12, adopted October, A. D. 1875.

Do these recitals NECESSARILY impart a compliance with the statute and constitution of Nebraska? They necessarily imply this only: *a.*) That they are issued by authority of, and in conformity with an order of the county commissioners. *b.*) That they are authorized by an election and by the statutes and constitution of the state. A critical examination of the language shows an entire lack of a recital "necessarily importing" that the bonds were issued "in pursuance of" or "in conformity to" the constitution of the state. The most that can be claimed for the recital is that it imports conformity with an order of the county commissioners and declares that it is issued under and by virtue of *power* contained in chapter 35, of the statutes, and article 12 of the constitution of the state. That the bonds are issued in conformity to, and in pursuance of the provisions of the statutes and constitution, cannot upon the plain and ordinary meaning of words be gathered from the recitals of the bond. The question of power is always open and it binds no one to make recital that an issue of bonds is authorized by a law or constitution. The purchaser

must look to the power in any event. It is only in matters of procedure necessary conditions precedent upon which alone the power can be brought into operation, that the doctrine of estoppel applies. The recitals of this bond, except the first, all relate to power rather than procedure. As conferring power or enlarging or abridging it in any degree the recitals are a nullity and binding on no one. The forms of recital which have been sustained by this Court as working an estoppel in matters of procedure are, "in conformity to" the provisions of the statutes, "by virtue of *and* in accordance with," "in pursuance of *and* in accordance with."

From what language in this bond does a purchaser necessarily derive the knowledge that these bonds are issued in conformity with these provisions of the constitution of the state which prohibit bonds above ten per cent of valuation? It is impossible to find it. On the contrary, the language points to the constitution as the source of power only, and the most careless examination of it would show the purchaser the power did not exist. The only power granted is to increase an existing indebtedness to a certain limit and the bond is totally lacking in recitals necessarily importing that that limit had not been reached, or that an existing debt had been increased.

But it seems to us that upon the special findings in this case the whole question is disposed of in the case of Litchfield vs. Buchanan, 102 U. S. 278. In this case certain bonds of the town of Litchfield, in the state of Illinois, contained this recital:—

"This bond is issued under the authority of an act of the General Assembly of the state of Illinois, entitled, 'An act authorizing cities, incorporated towns and villages to construct and maintain water-works, approved April 15th, 1873,' and in pursuance of an ordinance of the said city of Litchfield, number 184,

entitled, 'An ordinance for the issuance of bonds for the Litchfield waterworks.' "

It was conceded that the plaintiff was a bona fide holder and upon this recital the Court say:

"Neither the statutes of April 15th, 1873, nor the ordinances of the city made any reference to the 12th section of article 9 of the state constitution adopted in 1870. That section declares that 'no county, city, town, township, school district, or any municipal corporation shall be allowed to become indebted in any manner or for any purpose to an amount, including the existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained by the last statement of the assessment of taxes previous to incurring such indebtedness.' "

Further on the Court in stating the question to be decided uses this language: "If therefore it appears by evidence of which the city can rightfully avail itself as against a bona fide holder for value of the coupons in suit, that the bonds issued January 1st, 1874, created an indebtedness in excess of the amount to which municipal indebtedness is restricted by the constitution, there would seem to be no escape from the conclusion that the bonds are void for the want of legal authority to issue them at the time they are issued."

The Court then goes on to declare, if we understand its language, that a purchaser of municipal bonds, whose validity depends upon the percentage they represent of the assessed value of the taxable property of the city or county for a certain year, is bound to look himself to the public records to ascertain whether the bonds are within the limit of power granted, and that upon that point there is no estoppel by any recital contained in the bond. The language used is this:

"The purchaser of the bonds was certainly bound

to take notice not only of the constitutional limitation upon municipal indebtedness, but of such facts as the authorized official assessments disclosed concerning the valuation of taxable property within the city for the year 1873."

It does not seem to have been a matter of controversy in the Court that the purchaser was bound to take notice of the public records disclosing the assessment upon which the validity of the bonds rested. The only matter upon which there seems to have been any doubt was the source to which the purchaser should resort for the purpose of ascertaining the amount of the existing indebtedness. As in this case the provision was that the amount of the bonds voted, together with the existing indebtedness of the city or county, should not exceed a certain assessed valuation of the county.

"That knowledge" (i. e., of the existing indebtedness) the Court say, "as particularly within the knowledge of the constituted authorities of the city or county, and their determination upon it was final."

But the public, open and notorious record of the assessed valuation of the county, which operated as a limitation of power in this case, was as open and accessible to the purchaser as the constituted authorities of the county or city.

The Court then say:

"It will be observed that the bonds issued by the city of Litchfield contained no recital of the circumstances which, under the constitution of the state, must have existed before the city could lawfully incur the indebtedness for which the bonds were issued. They purport, it is true, to be issued under the authority of the act of April 15, 1873, and in pursuance of an ordinance of the city based upon that statute; but the statute does not expressly restrict the exercise of power to erect and maintain a system of water-

works, to cases in which the aggregate indebtedness of the city was within the limit which the constitution declared no municipal corporation should exceed; nor does the city ordinance recite or state even in general terms, that the proposed indebtedness was incurred in pursuance of, or in accordance with, the provisions of the constitution of the state which permitted the issue of the bonds. Consequently a recital that the bonds were issued under the authority of the statute and in pursuance of the city ordinance, did not necessarily import a compliance with the constitution."

Had the bonds made the additional recital that they were issued in accordance with the constitution, or had the ordinance stated in any form that the proposed indebtedness was within the constituted limit, there would have been ground for holding that the city could not, as against the plaintiff, dispute the fair inference to be drawn from such recital and statement as to the extent of its existing indebtedness."

And the Court further say:

"The present action cannot be maintained unless we should hold that the mere fact that the bonds were issued without any recital of the circumstances bringing them within the limit fixed by the constitution, was in itself conclusive proof in favor of a bona fide holder that the circumstances existed that authorized them to be issued. We cannot so hold."

Here then is a case in which, to sustain the validity of a bond, these facts were necessary—that the amount of the proposed indebtedness, added to the previous existing indebtedness, should not exceed a certain limit, and this limitation was found in the constitution of the state of Illinois.

The bond there in controversy did not recite that it was issued *in pursuance of* the constitution of the state, and it was held void for the reason that under

these circumstances the purchaser was bound to take notice of the public record which, together with the amount of the existing indebtedness of the city, showed a non-compliance with the constitution.

In the case at bar we have an absolute and unconditional prohibition against the issue of bonds in excess of fifteen per cent. of the assessed valuation of the taxable property at the last previous assessment, without any reference to existing indebtedness.

The recitals of the bond, fairly construed, do not state that it is issued in pursuance of the constitution of the state, though it may be held to state that it is issued by authority of the constitution of the state; the two phrases in our opinion being very wide apart.

Applying the principle of Buchanan v. Litchfield, it seems plain to us that the purchaser, under these circumstances, is bound by the notice contained in public records of the county of the assessed valuation necessary to authorize the bond, and he having purchased in disregard of them and the information they contain, he is clearly within the principle enunciated by the Supreme Court in this case. And this seems to us just. We have never been able to understand why it should be held that the purchaser of a negotiable municipal bond at any stage of its existence should be legally bound to look to the power, statutory and constitutional, upon which it is based, and not at the same time look to the limitations of that power, and it seems to us a contradiction in terms, to say, that the power exists in any case except when the bond is strictly within, not only the general power, but its limitations as expressed in the statutes and in the constitution.

But in a later case, School District vs. Stone, Vol. 5. No. 5, Morrison's Transcript,—the Court, applying the principal of Buchanan vs. Lichfield, has gone still

further in limiting the effect of vague and uncertain recitals in working an estoppel upon the county. In that case there was a limitation contained in the constitution of Iowa upon the issue of school district bonds in excess of five per cent. of taxable property. The bond in suit recited that it is issued by the board of school directors by authority of an election of the voters of the school district, in conformity with the provisions of chapter 98, art. 12th, General Assembly of Iowa.

The Court states the question to be decided thus—"The bonds in suit constituting one issue, and aggregating $15,000, must be held to have been made without authority of law, and, upon well-established principles, are not enforcible obligations against the district, unless it is estopped by their recitals from showing against a bona fida purchaser the value of its taxable property as disclosed by the last state and county tax lists to the creation of the debt."

And then proceeds:

"Waiving any discussion of the question whether the constitutional requirement that the amount of the taxable property should be "ascertained by the last state and county tax lists" did not compel any purchaser, at his peril, to obtain from that source the necessary information, and did not preclude him from relying upon the representation of district officers as to what those lists disclosed, we are of opinion that the recitals in the bonds do not, necessarily or distinctly, import any determination of that question by the district officers invested with authority, under certain circumstances, to issue them. Had the bonds recited that they were issued by authority of the election of July 31, 1869, and in conformity with the provisions of the statute referred to there, would, in view of the decisions of this Court, be more force in the argument in behalf of the defendant in error

And we should then be obliged to decide whether, in view of the constitutional provision, a false recital by the school board as to the value of the taxable property would conclude the district as between it and a bona fida purchaser for value; for in such case, since the statute itself contains substantially the same limitation upon indebtedness by independent school districts as is prescribed by the state constitution for county or other political or municipal corporations, a distinct recital that the bonds were issued in conformity with the statute would fairly import a compliance with the constitution. But the recitals do not, as we have said, necessarily import a compliance with the statute or the fundamental law of the state upon that subject. They necessarily imply nothing more than that the bonds were issued by authority of the electors, and that the election was held in conformity with the statute. The statute may have been pursued as to the notice required to be given of the time and place of the election, and as to the manner in which the will of the voters was to be ascertained, and yet it may have been disregarded in respect to the limit it imposed upon district indebtedness. The declaration, therefore, that the election was held in conformity with the statute does not, with sufficient distinctness, imply that the indebtedness voted was less than five per cent. of the value of the taxable property of the district, as shown by the state and county tax lists.

This construction of the words employed in the bonds is characterized by counsel for defendant in error as too narrow and technical. It may be a strict construction, and such, it seems to the Court, ought to be the rule when it is proposed, by mere recitals upon the part of the officers of a municipal corporation, to exclude inquiry as to whether bonds issued in its name made in violation of the constitution and

the requisite notice to be given, canvass the vote, declare the result, and order the issue of the bonds. They alone, as it seems to us, are vested with power to decide whether the conditions precedent to make a valid bond have been complied with.

The secretary of state, and the auditor, are nowhere vested with such power, and the decision of any tribunal, in respect to the validity of the bonds, will have no force unless clothed by law with power to make such decision.

The certificate of the auditor is endorsed upon the bonds simply in pursuance of the provisions of the law providing for the registration of bonds, and there is no statutory declaration that his certificate has any binding effect upon anybody. In terms it does not purport to have such effect. He is not a participator in the procedure out of which the bond grows. There is transmitted to him on the other hand, by the board of county commissioners, a record of its proceedings, and upon that record alone he makes a certificate to the effect, that from the data before him the bonds appear to have been legally and regularly issued and are entitled to registry, but he has no power, in the first instance, to declare the validity or invalidity of any step in the series of steps leading to the issuing of the bonds, and which the Supreme Court designates "the conditions precedent" to their issue. These steps are alone to be jugded of by the board of county commissioners.

Passing then to the certificate of the secretary and auditor of state endorsed upon the bond in pursuance of sec. 2, of art. 12, of the constitution. That provision is as follows:

"No bonds or evidences of indebtedness so issued shall be valid, unless the same shall have endorsed thereon a certificate signed by the secretary and audi-

tor of state, showing the same were issued in pursuance of law."

This is not a declaration that the certificate of the secretary and auditor shall be evidence to the world that the bond is valid, but it seems to be a provision for the protection of the public, by a sweeping declaration, that unless such a certificate is endorsed upon the bond, it shall be absolutely void and shall be of no validity in the hands of anybody.

There is no statute of the state of Nebraska, in pursuance of this article of the constitution, prescribing what the affirmative effect of such a certificate shall be, or in any way making the secretary and auditor the judges of the performance of conditions precedent.

So it seems to us that these certificates cannot be regarded as creating an estoppel, for the plain reason that the parties making them are not invested with the power of determining the question upon which an estoppel takes effect, and that in that particular they are in a directly opposite position to the county commissioners.

III.

There is no power under the laws or constitution of Nebraska to issue a bonded indebtedness in excess of ten per cent. of the assessed valuation of a county. The only power granted to exceed that amount is by the increase of an existing indebtedness. The finding of the jury is that the amount was voted upon a single proposition and at a single election, which precludes the existence of a previous indebtedness for internal improvements.

The cases in which excessive issues have been upheld are those in which an original power to issue has contained its own limitation, and the holding has

been that, given the power, the question of exceeding or observing the limitation was remitted by statute to the county commissioners, and their decision in issuing the bonds is an estoppel. In the case at bar, the power is an original, substantive, distinct authority not to vote bonds generally, but to increase an existing indebtedness incurred for internal improvements. So all the decisions of this Court require the purchaser to look for himself to the existence of the power. The authority was to increase an existing indebtedness. There is no pretense that any such proposition was submitted to, or voted upon by the people, nor do the recitals of the bond necessarily import these facts.

Again, the reasoning of all the cases declaring an estoppel by recitals in the bond, proceeds upon the ground that the county commissioners are vested by law with authority to determine the matters covered by the recital, and therefore their decision is conclusive. This ground is especially elaborated by Mr. Justice Strong, in Marcy vs. Township of Oswego, 92 U. S., 640, and upon it he rests the judgment of the Court.

It cannot be gathered from the statutes or constitution of Nebraska, that the county commissioners are authorized or required to determine whether the constitutional limit of ten per cent. has been exceeded, or whether the proposed indebtedness is original or an increase of an existing one. It seems to us a monstrous proposition to say that the commissioners are authorized by law to insert by way of recital into a bond a manifest, palpable, notorious falsehood—as evidenced by the public records—open to every one, and known to every intelligent man in the county. The county clerk keeps the record of the board of county commissioners. One of ~~this~~ their duties is to examine the assessment roll and equalize assessments, thus compelling a knowledge of the character and extent of

the assessed valuation of the county. To say under these circumstances that corrupt officials have lawful authority by a false recital of a matter of public record, equally open to the examination and inspection of creditor and debtor, to bind the taxpayer, is to our mind to subvert natural justice and put a premium on fraud and laches—fraud in the maker of the bond, laches in the purchaser of it.

In School District vs. Stone the Court say:

"We should then be obliged to decide whether in view of the constitutional provision a false recital by the school board as to the value of the taxable property, would conclude the district as between it and a bona fide purchaser for value."

If that question is found in the present case, we invoke the direct and distinct judgment of the Court upon the question whether an open, notorious public record can be falsely recited away in the interest of a purchaser who deliberately and perhaps designedly closes his eyes to its existence.

In conclusion, we have never been able to understand how, in requiring the purchaser to look to the power of issue, as has uniformly been the holding of the Court, it is possible to consider it, except as an entirety. The limiting words of the statute and constitution are as much the line and boundary of the power as the granting words. Any other view refers the power to the will of the county commissioners—often unlearned and inexperienced, sometimes untrustworthy and corrupt.

Such a rule practically abolishes all statutory and constitutional restrictions and limitations, and in lieu thereof turns the taxpayer over to the tender mercies of the decrees of a local board, actuated by self-interest, swept by local passion and prejudice, and at its best utterly inadequate to the interpretation and construction of constitutions and laws.

To our minds, the reasoning in the dissenting opinion of Justices Miller, Field and Davis in Humboldt Township vs. Long et al., 92 U. S., P. 646, is conclusive and unanswerable. We refer to it here in the hope that the Court may yet see its way to engraft the principles therein vindicated upon the jurisprudence of the country.

A. J. POPPLETON,
J. M. THURSTON,
Counsel for Plaintiff in Error.

111-83

IN THE

Supreme Court of the United States

No. 582.

THE COUNTY OF DIXON,
Plaintiff in Error,

vs.

MARSHALL FIELD,
Defendant in Error.

TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

Brief and Argument for Defendant in Error.

P. C. Kenyon, Publisher Law Briefs, Des Moines, Iowa.

IN THE

Supreme Court of the United States

No. 582.

THE COUNTY OF DIXON,
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vs.

MARSHALL FIELD,
Defendant in Error.

To the Circuit Court of the United States, for the District of Nebraska.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

The plaintiff in error objected to the judgment upon the special findings of the jury, because, *first:* "it appeared that plaintiff, before the purchase of the bonds, had notice, *by reason of the public record*, of the assessed valuation of all the taxable property in the county:" and, *second*, because "said assessed valuation was not sufficient to sustain the bonds so issued upon said assessed valuation, and in pursuance of the rate alleged in plaintiff's petition, and they were, therefore, absolutely void."

In these exceptions, you have the body of the case. In other words, the proposition is, that the bonds, by reason of these exceptions, were absolutely void in the hands of *a bona fide holder*. It is conceded, and the record abundantly shows, that the plaintiff (Field) is such holder, and that, if he cannot recover, no one can. This argument will assume such ownership.

We only remark, at the out-set, that the suggestion of counsel that testimony showing that nothing was done, "either in

grading or the construction of the road, was ruled out on the trial," is absolutely without the least warrant in the record or in the actual facts. Such testimony was never offered, and would not have been true if offered. The truth is that the road was completed into Dixon county as contracted for, inspected, rode over, and accepted by the county commissioners, before the bonds were issued and hence the talk of fraud is without foundation, and the defense here interposed is based upon the merest technicality. The county got all it contracted for. We only mention this in passing, perfectly conscious, as we are, that what either counsel may say, outside the record, can avail nothing.

FACTS.

What are the facts of this case?

1. The defendant made its eighty-seven bonds, dated January 1, 1876, but not issued, in fact, for several months after that, payable to the C. C. & Black Hills Railroad Company, or *bearer*, in the city of New York, twenty years from date, each being in the sum of $1,000, with interest at ten per cent., payable semi-annually. This amount was more than ten per cent. upon the then assessed valuation of the county; approximated fifteen.

2. Each bond contained the recital that it was "issued *under* and in *pursuance* of an order of the *county commissioners of the county of Dixon*, in the state of Nebraska, and *authorized by an election held in said county* on the 27th day of December, 1875, and *under and by virtue of chapter 37, of the general statutes of Nebraska, and amendments thereto, and the constitution of the said state*, Art. 12, adopted October, A. D. 1875 (Fol. 17).

3. On the back of each bond was the certificate of the county clerk, reciting that this issue of bonds was the only one ever made by the county; that "the question of issuing said bonds was submitted to the people of the county by a resolution of the county commissioners, dated November 24, 1875,

in the following form: Shall Dixon county issue to the C. C. & Black Hills Railroad Co., $87,000 10 per cent. twenty years bonds, payable both principal and interest in New York city, and shall a tax be annually levied, in addition to the usual taxes, sufficient to pay interest as it becomes due, and accumulate a sinking fund to pay the principal at maturity?" and further, that "this question was decided by a vote taken December 27, 1875, of 462 votes for and 120 against." This certificate is witnessed by the hand and official seal of the clerk, of date May 16, 1876.

4. There was also endorsed on each bond the certificate of the secretary and auditor of the state of Nebaska, dated October 2, 1876, that "*it was issued pursuant to law*," and the further certificate of the auditor of same date, "that upon the basis of data *filed in my office*, it appears that the attached bond has been *regularly and legally issued by the county of Dixon* to C. C. & B. H. Railroad Company, and said bond, upon presentation thereof by said company, has this day been *duly registered in* my *office* in *accordance with the provisions* of an act entitled, 'An act to authorize the registration, collection and redemption of county bonds, approved Feb. 25, 1875.'"

5. Plaintiff, as already stated, is an innocent holder for value of the bonds and the coupons in suit, and the single question, therefore, is whether, being such, under the facts disclosed, and the constitution and laws of Nebraska bearing thereon, he can recover. In other words, are the bonds in his hands void?

I.

NEBRASKA CONSTITUTION—LIMITATION.

The argument against their validity is, that in the aggregate they exceeded *ten per cent.* of the assessed valuation of the county; that though there was a two-thirds vote in favor of the bonds, yet this proposition was not one to *increase a prior indebtedness* five per cent.; that the assessed valuation, "which was shown

and appeared from the public records of the county," was notice that this amount could not be donated or voted, and that since every one taking these bonds was bound to take notice of this fact or this record, therefore, the bonds in the hands of any person are void.

This proposition is based upon and grows out of a claimed construction of the constitution of Nebraska (Sec. 2, Art. 12), found quoted on the third page of their argument. This article provides that the proposition for aid to any railroad, etc., etc., shall be first submitted to the qualified electors at an election, etc., etc.—

Provided, That such donations of the county, with the donation of such sub-divisions, in the aggregate shall not exceed 10 per cent. of the assessed valuation of the county. *Provided, further*, that any city or county may, *by a two-thirds vote increase such indebtedness five per cent. in addition to such ten per cent.*, and no bonds or evidence of indebtedness, so issued, shall be valid unless the same shall have endorsed thereon a certificate signed by the secretary and auditor of state, showing that the same is issued *in pursuance of law*.

The primary, but not by any means the principal, question here turns upon the meaning of the words above italicized, it being insisted by the other side that since no *previous* indebtedness existed at the time these bonds were authorized, the attempt to create this indebtedness in excess of 10 per cent. *by one act or vote* renders the bonds in their entirety void. This we deny.

It is said that you cannot increase an indebtedness which as yet has no existence, and that hence, since the county had not when the bonds were voted, any indebtedness, therefore, as there was nothing to increase, there was no state of case to warrant a donation beyond 10 per cent., and from this it is argued, as already suggested, that all the bonds are invalid.

Let us see. The word "indebtedness" is not used preceding the second proviso. The power to give county aid to railroads existed beyond dispute, and is recognized as existing by this

very article. By this, it was, we concede, intended to put certain limitations upon the exercise of this power. If the word "donation" is the *indebtedness* to which the word "such," preceding "indebtedness" in the second proviso refers, then the inhibition is to be taken as an entirety, all construed together—the ten per cent. to be voted by such numbers as the legislature might determine, but *more than this* (not to exceed five per cent. in addition to such ten per cent.), could not be donated, except by a two-thirds vote. The constitution was here treating of these limitations as a whole. First, it says that even by a popular vote, the donation shall not exceed ten per cent., but it may be increased to fifteen per cent., not by a majority, but by a two-thirds vote. It is the increase of such indebtedness—that is, the "donations" before spoken of, "*in addition to such ten per cent.*," which it was declared could only be done by this more than majority vote. It is the same as if it had said, but such *donations* may be increased to fifteen per cent. by such vote. The language used must be considered and construed according to its usual and accepted meaning; and this court will look at what was in the mind of the convention, and against what it was providing.

What reason is there for the other construction? The language is not that a county may increase any *prior* indebtedness—add to something already in existence; but may "increase *such* indebtedness"—that is, increase a proposed donation from ten to fifteen per cent. by such vote. While we concede that a prior indebtedness might be increased to fifteen per cent., if the additional five was given by a two-thirds vote, we nevertheless submit, with confidence, that there is nothing in the language used, nor in the reason or logic of the provision to prevent the people, by one such vote, from making a donation of fifteen per cent. "of the assessed valuation." And, certainly, there is no danger to the people from this construction, for it will always be more difficult to obtain the large vote for the *one* indebtedness of fifteen per cent., than for a five per cent.

additional. Those interested in some work of internal improvement might obtain a previous donation of ten per cent., and then, by the pressure and machinations of which some of them are such masters, easily obtain a two-thirds vote for an additional five per cent., or the county loses all—whereas, as a first proposition, the fifteen per cent. could not possibly carry. But aside from the question of danger or safety to the people, we submit that our construction is the more reasonable.

Then again, the statutes of Nebraska, in force when this constitution was adopted, authorized counties to issue bonds in aid of railroads, to an amount equal to 10 per cent. of the assessed valuation, when authorized thereto by a two-thirds vote (Gen. statutes, Ch. 35, Sec. 4, and amendments thereto, Laws 1875, p. 87). By the constitution (Sec. 1, Art. 16), above quoted all laws in force not inconsistent therewith are continued, and Sec. 2, Art. 12, above quoted, it will be seen removes the limitation of 10 per cent. provided by the statute, and extends the power to the electors, by a two-thirds vote, to aid to the extent of 15, instead of 10 per cent. It thus removes the restriction of the statute, and leaves it as under previous laws, for the constituted authorities and the people to determine whether the aid shall be voted at one time or several. It would have been easy to declare that the larger per cent. should not be voted in the first instance. There is nothing said about more than one vote. The object evidently was to prevent an unreasonable, or what might be a burdensome indebtedness, whether by one or several votes, and it was deemed safe and in the interest of the people to provide against the larger or maximum indebtedness, except it was incurred or authorized by this larger vote.

But we are referred in this connection to *Reinman vs. C., B. H. & C. R. Co.*, 7 Neb., 310, as holding that there is no warrant in that state for creating a county indebtedness, in aid of railroads, exceeding in the aggregate 10 per cent. of the assessed valuation of the taxable property, etc., etc.

To this we answer, *first*, that there the controversy was not between the county and an innocent holder of the bonds, but it arose upon an injunction proceeding to restrain the *issue* of the bonds. We need hardly say that very different rules obtain when a point of this kind is made, *before* the bonds are put upon the market—before the officers appointed by law have determined and acted—and a case where they have acted, and the bonds passed into the hands of innocent holders for value. Defendant in error is in this case in the latter attitude.

In the second place, that case was decided long *after* the bonds in this case were issued—after our client had invested his money, and hence he cannot, upon the theory of an adjudication by the highest court in the state, be affected thereby.

In the third place, if the case had even involved the rights of an innocent holder of these coupons, it would not be in any manner binding on this court. As was said in 19 Wall., 666, (*Township of Pine Grove vs. Talcott*), the question here involved belongs to the domain of general jurisprudence, and this court is not bound by the judgment of the state court. It must hear and determine for itself, for here commercial securities are involved. When the bonds were issued there had been no authoritative intimation from any quarter that they were invalid. This and much more is said, clearly showing that this court does not yield in this class of cases to the authority of state decisions. To the same effect see—

Olcott vs. Supervisors, 16 Wall., 678.
Foote vs. Johnston Co., 5 Dillon, 281.
Weberman vs. Cape Girardeau Co., 7 Cent. L. J., 353.
Gelpcke vs. Dubuque, 1 Wall., 175.
Butz vs. Muscatine, 8 *Id.*, 575.

It is not true, therefore, as claimed by counsel, that the case cited, or any one like it, is conclusive upon this court. The decision of a state court in matters of this kind cannot lead to the abdication by this high tribunal of one of the most im-

portant trusts with which it is charged, as a part of an independent federal judiciary.

II.

BONDS IN ANY EVENT VALID IN THE HANDS OF AN INNOCENT HOLDER—COUNTY ESTOPPED.

The main predicate of the argument against these bonds, and to show that plaintiff was not protected, is, that he had notice by the *public record* of the assessed valuation of the property of the county, and knew, therefore, of the excessive issue.

It will be observed in the first place, that nowhere in this record, in all the proceedings leading to the vote, or in the bonds, or in any of the certificates or endorsements, is there a word said about the *percentage voted upon the property valuation*. The question voted upon was, whether the county should issue to the railroad company $87,000 of ten per cent. twenty years' bonds, and this was carried by a vote of 462 to 120, or almost four to one (Fol. 20). There was, therefore, nothing whatever to put any purchaser upon his guard, or lead him to know what proportion the $87,000 bore to the entire property valuation of the county. He could as well conclude that it was ten per cent. or less, as that it was more, or fifteen.

Then again, in view of the provisions of the constitution, how probably unfruitful would be the mission upon which counsel would send the purchasers of these and like bonds. As will be seen, it is, by the constitution, declared that the donations of a county *with the donations of such subdivisions* (town, precinct, or other sub-division), *in the aggregate*, shall not exceed ten (or fifteen) per cent. of the assessed valuation. Counsel would impose upon such purchasers in the face of all the certificates found in this instance, made by officers especially entrusted with the discharge of these duties; we say he would impose upon them the duty of going to the records of every town, precinct or other sub-division, as well as the county, to

ascertain whether the limit had not been exceeded: and if purchaser, he failed, after the most faithful search, to find an indebtedness ever so small, which added, would swell the donation beyond the amount limited, his bonds would all be void, and he would take nothing by his purchase. Fortunately, in view of the repeated decisions of this court, and fortunately, too, for the marketable value of just such securities, a purchaser is not bound to do anything of this kind. The county, through its accredited officers, acts for the people, and there is, as has been held over and over again, the salutary rule of estoppel which binds the county, and protects those who act upon the faith of such action; and, therefore, we say, even if the constitution contemplates an additional five per cent. upon a prior existing indebtedness, and not an indebtedness in excess of ten per cent. by one vote, or as a first and only donation, it would still be true that the bonds would be valid in plaintiff's hands.

This question has been so often before this court, and so often ruled, as we claim, that we feel like asking pardon in talking about it.

What does this record show?

An election held in pursuance of notice by the constituted authorities, and a two-thirds majority in favor of these bonds. On the face of each bond it is recited that it is issued in pursuance of *an order of the county commissioners,* * * * and *authorized by an election held* * * * *and under and by virtue of chapter 35, etc.*, and *amendments thereto, and the constitution of the state, Art. 12.* On the back is an extract from the constitution (Art. 12) also from the general statute (Ch. 35) which gives the authority to issue such bonds, provided the commissioners shall first submit the question to a vote of the legal electors, and further declares that any county issuing such bonds shall be *estopped from pleading want of consideration therefor.* Following this on the bond is the clerk's certificate that the question of issuing said bonds was submitted to the people by a resolution of the commissioners, and that it

was carried by the vote already stated. Then follows the statement of the secretary and auditor of state, as required by law, that the bond *was issued pursuant to law, and of the auditor, also required by law, that said bonds were regularly and legally issued by the county.* Now, if under the authorities these recitals and these facts do not estop the county, in an action by an innocent holder, then we do not see how it could be made more complete, nor how counsel can avoid the conclusive effect of the numberless decisions of this court.

Marcy vs. Township of Oswego, 92 U. S., 637, is directly in point and covers this whole case. The reasoning there used could, by a mere change of names and statutes, be applied in its every word to the case at bar. Plaintiff, in this case, was not, therefore, bound under the authority of that, when he purchased, to look beyond the act of the legislature, the constitution and the recitals which the bond, in all its parts, contained.

To the same effect, I need hardly say, is, *Town of Coloma vs. Eaves*, 484, as also

Bissell vs. Jeffersonville, 24 How., 287.
Von Hostrup vs. Madita City, 1 Wall., 291.
St. Joseph Township vs. Rogers, 16 Wall., 644.

and the leading case of *Knox Co. vs. Aspinwall*, 21 How., 544, which has never been overruled, but repeatedly reaffirmed, among others by the cases of

Meyer vs. Muscatine, 1 Wall., 384.
Mercer county vs. Hackett, *ibid*, 83.
Moran vs. Miami county, 2 Black., 732.

See also,

Town of Venice vs. Murdock, 92 U. S., 494.
Cowaver vs. City of Fort Scott, *ibid*, 503.
Commissioners vs. Bolles, 94 *ibid*, 104.
State vs. Jannarey, *ibid*, 202.

It is evident, however, that counsel rely as to the insufficiency of the recitals, whether in the bond, the clerk's, the

secretary's, or the auditor's certificate, upon the cases of *Buchanan vs. Litchfield*, 102 *Id.*, 278; *Stone vs. School District*, 106 *ibid*, 183; and the further delusive hope that this court will depart from the rule so often and conclusively established; we say it is quite evident that herein is their hope for a reversal. As we have seen, the record shows that the bonds were issued "*under and by virtue of the statute* and *the constitution*;" that the election leading to the issue of the bonds was ordered by a resolution of the board, that the bonds were "*issued pursuant to law*" and that from the data on file in the office of the state auditor, he certified that said bonds "have been regularly and legally issued." And all these things, all these statements and certificates, are in strict and literal compliance with the statute.

In the Stone case (*supra*), Mr. Justice HARLAN, speaking for the court, said:

> They (the recitals) necessarily imply nothing, more than that the bonds were issued by *authority of the electors*, and that the *election* was held *in conformity* with the statute. * * * The declaration, therefore, that the election was held in conformity with the statute does not, with sufficient distinctness, imply that the indebtedness voted was less than five per cent. on the value of the taxable property of the district. * * *

And then he adds (having in view what the court had so often ruled, that)—

> Numerous cases have been determined by this court, in which we have said that when a statute confers power upon a municipal corporation, upon the performance of certain precedent conditions, to execute bonds in aid of the construction of a railroad, or for other like purposes, and imposes upon certain officers—invested with authority to determine whether such conditions have been performed—the responsibility of issuing them, when such conditions have been complied with, recitals by such officers that the bonds have been issued "in pursuance of," or "in conformity with," or "by virtue of," or "by authority of" the statute, have been held in favor of *bona fide* purchasers of value, to import a compliance with the statutes, and to preclude inquiry as to whether the precedent conditions have been performed before the bonds were issued.

And still again:

Had the bonds, recited by the authority of the election of July 31, 1869, and in conformity with the provisions of the statute referred to, there would, in view of the decisions of this court, have been more force in the argument in behalf of the defendant in error.

Citing many cases, and among these, some of those relied upon by us, and referred to above.

We are quite willing to rest our case upon the very authority so confidently relied upon by our friends. We do not stand upon a mere recital that the bonds were issued "*by authority of the statute*," and that the "*election was held in conformity with the statute*." That, and no more, was in the Stone case. This record shows that the bonds were authorized by an election and were "*issued under and by virtue*" of the statute and constitution—that they were "issued pursuant to law," and "regularly and legally issued." Now if the words "in pursuance of" or "in conformity with," or "by virtue of" or "by authority of" have been held to "import a compliance with the statute and to "preclude in favor of a *bona fide* purchaser, inquiry whether the precedent conditions have been performed before the bonds were issued"—most clearly the recitals in this case import such compliance and preclude such inquiry.

It is worthy of remark that Justice HARLAN in the Stone case (106, 186,) cites *Buchanan vs. Litchfield* (102, 278,) in support of the very doctrine for which we contend; and yet counsel claim it as an authority in their favor. It does not touch the case at bar. It is familiar to the court, and we shall comment upon it very briefly. After showing what this court has ruled (citing many cases) all in perfect harmony with our claim—the conclusion is that—

> The present action cannot be maintained, unless we hold that the *mere fact*, that the bonds were issued without any recitals of the circumstances bringing them within the limit fixed by the constitution, was in itself conclusive proof, in favor of a *bona fide* holder, that the circumstances existed which authorized them to be issued. We cannot so hold. * *

And again, after setting out the recitals in the bond, it is added:

Had the bonds made the additional recital that they were issued in accordance with the constitution (in our case they were issued "*under* and *by virtue* of the *statute* and the *constitution*," Fol. 17), * * * there would have been ground for holding that the city could not, as against the plaintiff, dispute the fair inference to be drawn from such recitals and statement, as to the extent of its existing indebtedness. * * *

And if "as to the extent of its existing indebtedness," then why not in this case as to the same thing and the legality of all prior steps to the proper and valid execution of the bonds?

But that case holds further that—

It would seem that if the bonds had contained recitals, which, upon any fair construction, amounted to a representation upon the part of the constituted authorities of the city, that the requirements of the constitution were met, that is, that the city's indebtedness increased by the amount of the bonds in question was within the constitutional limit, then the city, under the decisions of this court, might have been estopped from disputing the truth of such representations as against a *bona fide* holder of the bonds.

(This would have brought the case within the rule of *Odanah vs. Essex, supra*, 92 U. S., 484, and others like it.)

Then, too, in that case, there was an express constitutional limitation upon the power of municipalities from issuing an indebtedness, for any purpose, or in any manner, in excess of a certain amount, and this amount was exceeded, in direct violation of the constitution, to the provisions of which no reference whatever was made in the bonds. In our case, the limitation was not exceeded, and the constitution was referred to, it being expressly stated that the bonds were issued "under and by virtue" not only of the law, but of *the constitution*. In the one case, the recitals contained in the bond might all be literally true, and still the bonds be void. In the other (ours) the recitals, and especially in connection with the certificates of the officers, could not be true and the bonds invalid. In our case, if the recitals are true, the bonds could not have been issued in violation of the constitutional prohibition. In the one case, the statute did not restrict the power of the city to cases where the aggregate indebtedness did not exceed the constitutional

limitation. If it had, and the bonds had recited that they were issued *under, by virtue* of, or in accordance with, such statute, there can be no doubt, from the opinion, that such recital would have estopped the city. In the case at bar, the statute and constitution do limit the amount. And hence, if the bonds were issued "under and by virtue of" the statute and the constitution, then to say that the limit was exceeded would be to contradict the plain and positive recital of the bonds, which cannot be done. In a word, the very section of the constitution (and the legislative act, too) which authorized the issuance of the bonds, and which contains the limitation, is referred to specifically in this case, while in the other there was no such reference, and the court held that the purchaser was put upon inquiry. Beyond any question, the county (Dixon) had the power, under the constitution and statute, to issue bonds to an amount equal to ten per cent. of the assessed valuation. In the other case, there was no power to issue any of the bonds. In our case, there was nothing said or omitted to show what relation the bonds bore to the valuation, whether it was ten per cent., or more or less. In the other case, there being the absence of all power, and no recital showing or pretending a compliance with the constitution, there was no estoppel. So we say the two cases are, in their facts and principles, so unlike that it is more than strange that one should be invoked in support of the other; and especially in view of the many cases so abundantly upholding the validity of the bonds in suit.

We have more than once referred to the extracts from the constitution and statute endorsed upon the bonds, which were before the purchaser, as, in part, the evidence showing the legality and regularity of the issue. Counsel say that the extracts are not full—do not give all the enactments or constitutional provisions bearing upon the power of the county and the validity of the bonds. Let this be granted, and what of it? That is a matter for them to settle with their client. The

county issued the bonds, put all the recitations in and on them, and if there was any fraud, or wrong, or misleading, it is the fault of the bond-maker, not ours. If the county, either by suggestion or suppression, stated an untruth, or withheld a truth, and harm resulted to it therefrom, why should counsel complain of the misled purchaser for relying upon the truth of what he found?

It is virtually conceded that if these bonds had stated that they were "issued in pursuance of the constitution," the county would be estopped. But it is said that to state that they were issued "by authority of" or "by virtue of" the constitution is not sufficient, for that the two phrases are wide apart. This proposition, in view of what was said in the Stone case (106 U. S., 187), is without the least weight, for it is there said, in effect, that "in pursuance of," "in conformity with," "by authority of" and "by virtue of" are synonymous, import a full compliance with the statute, and preclude inquiry, etc. Not only so, but an act cannot be said to be done "legally," to be done "regularly and legally," to be done "under and by virtue" of a statute or constitution, unless it is done in accordance with or in pursuance of the same. If done "under and by virtue" of these, the language clearly signifies and means, that the act done is within the powers and under the limitations expressed in the statute or constitution under which the power is exercised.

As heretofore shown, on these bonds were certificates of the state officers, as required by the statutes and the constitution (Sec. 2, Art. 12), that they were issued "pursuant to law," and that from data filed in the office of the auditor it appears that they had been "regularly and legally issued" (Fol. 20 and 21).

Counsel say that the constitution does not declare that these certificates shall be evidence that the bonds are valid, but is a mere declaration, for the protection of the public, that *unless* so endorsed they shall have no validity, that there is no statute prescribing the affirmative effect of such certificates, and hence that they cannot be treated as creating an estoppel.

It is clear enough that unless so endorsed the bonds would not be valid. But if so endorsed are the certificates of no value to the public or the purchasers? It seems to us that the plain logic is that if not endorsed they are invalid, but if endorsed, the purchaser may accept that act, by one deputed by law for that purpose, as conclusive evidence that the law had been complied with and all things done in accordance with the requirements of the statute and constitution. The auditor, by the statutes (Fol. 19), must be "satisfied that the bonds are issued according to law." He then has a duty to perform—a determination to make. That determination he did make, for he says "that upon the basis of data filed in my office it appears," etc. In other words he says from the evidence before me I determine or decide that it "appears." Now, what appears? We answer in the language of the record and the statute, that said bonds have "been regularly and legally issued," and therefore, as the law requires, he admits the same to registry. And so the secretary and auditor, in making the certificates required by the constitution, must necessarily investigate and determine before making the certificate required by the constitution and statutes. Now, are these certificates evidence of nothing? Have they no office to perform affirmative and conclusive in its effect? Is it not a clear instance where the law by saying that if a certain thing is not done the act attempted is void, as plainly and necessarily, and in legal logic implies and teaches that if done it shall have the effect of curing prior possible defects, imparting validity, and obviating the necessity of inquiring into the regularity or legality of antecedent acts? Why should the constitution and the statute require these things, if when done, they are without force and effect? As already suggested these officers were to decide. To decide what? Whether the law had been complied with. They do this from evidence furnished them by the county. If such decisions and the certificate following do not create an estoppel, what can? They act for and represent the county, for the

whole people, all municipalities. The commissioners first decide that the facts warrant and justify the issuing of these bonds; they send to the state officers the evidence upon which their conclusion is based; these officers consider and examine this, and determine whether everything has been done pursuant to law, whether the preceding acts have been regular and legal. They are clothed with power; with power judicial, and when they decide in favor of the validity of the bonds and so certify, their act is not a mere idle, non-conclusive, inoperative, unimportant finding. The county, or a citizen, could have interposed to prevent these certificates. But this was not done. The power and jurisdiction to decide, and the conclusiveness of their decision was left unchallenged until the bonds were issued and passed into innocent hands. And now, after such action, and we had parted with our money upon the faith of these certificates, and all that preceded, it would be a travesty upon justice and the reliance properly to be placed upon official and judicial action, to say that the county is not concluded. We call attention, without quoting, to *Odoma vs. Eaves*, 92 U. S., 490, which has a material and important bearing upon the effect of registration and the conclusiveness of action and findings like those in this record. But upon this we will not add more.

We conclude by referring to the following cases and points:

If the state courts had even held the bonds invalid (they never have), this would not affect the rights of a non-resident *bona fide* holder in the federal tribunals.

Town of Pana vs. Bowker, 2d Sup. Court Rep., 704.

If there was authority to issue the bonds, and the recitals are effective to the extent claimed by us, or even approximately so, plaintiff can recover, though the R. R. did not comply with its contract. (That it did not, there is no scintilla of evidence.)

Kirkbridge vs. Lafayette Co., 2 S. C. Rep., 501.

Life Ins. Co. vs. Bruce, 13 Fed. R., 192.

Mayor vs. Kelley, 2 *Id.*, 468.